

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 10, 2014 appellant, then a 46-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2014 he sustained a right knee injury when he lost his footing as he was descending stairs and fell on his right knee while in the performance of duty. He stopped work on September 10, 2014. OWCP accepted the claim for right knee meniscal tear. It authorized right knee arthroscopic surgery, which was performed on February 10, 2015. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing February 10, 2015, and on the periodic rolls commencing October 18, 2015.

In a progress report dated August 28, 2015, Dr. Dayang Kim Mariena Jaya, Board-certified in internal medicine and occupational medicine, diagnosed right knee meniscal tear and right knee osteoarthritis. She provided permanent work restrictions of no climbing more than five stairs at a time, no use of scaffolds or work at height, no climbing ladders, no walking or standing more than three hours per day, and no knee bending, squatting, or kneeling.

On September 23, 2015 OWCP referred appellant for vocational rehabilitation to find a position within the restrictions provided by Dr. Jaya. Appellant began a paralegal training program on January 12, 2016 as part of his vocational rehabilitation program.

By decision dated September 22, 2016, OWCP expanded the acceptance of the claim to include right knee traumatic arthropathy and permanent aggravation of right knee osteoarthritis.

On December 13, 2016 OWCP noted that appellant would complete his training program that day and that he would be undergoing surgery on January 17, 2017. It indicated that the rehabilitation counselor was directed to close the case and appellant would be rereferred for vocational rehabilitation services once it was determined that he was capable of sedentary work.

Appellant underwent a right total knee replacement on January 27, 2017.

In an August 4, 2017 work capacity evaluation (Form OWCP-5c), Dr. Jaya noted that appellant had undergone a total right knee replacement. She related that he had limitations regarding lifting and squatting, but that he could perform medium level work.

An August 25, 2017 OWCP vocational rehabilitation report related that appellant was being referred for plan development. It noted that he had completed an extensive training program, but that he did not receive placement services because he underwent surgery. OWCP also noted that appellant had been released by his treating physician on August 4, 2017 for sedentary, light, or medium level work.

In a September 20, 2017 vocational rehabilitation plan, the vocational rehabilitation counselor described completed job classification forms (Form OWCP-66) for the positions of paralegal, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 239.362-026, and customer service representative, DOT No. 239.362-014. She indicated that the paralegal position was classified as light work, the customer service representative position was classified as sedentary, and both of these positions were available in appellant's commuting area.

On December 21, 2017 OWCP approved a 30-day extension of placement services with a new end date of January 23, 2018. It on January 24, 2018 approved a second 30-day extension of placement services with a new end date of February 24, 2018. On February 22, 2018 OWCP approved a third and final 30-day extension of placement services with an end date of March 24, 2018.

By letter dated June 12, 2018, appellant was offered a limited light-duty temporary position at the employing establishment, at the medium strength level. He rejected the job offer on June 24, 2018.

In a June 18, 2018 form report, Dr. Jaya detailed examination findings and provided permanent work restrictions no more than 50 pounds of occasional exertion of force and up to 25 pounds of frequent exertion of force.

On July 17, 2018 OWCP requested that the vocational rehabilitation counselor close the case as rehabilitation services were unsuccessful.

On July 14, 2020 OWCP referred appellant for a second opinion evaluation with Dr. Laura N. Sciaroni, a Board-certified orthopedic surgeon, to determine the nature of his condition, extent of disability, and appropriate treatment.

In a report dated September 3, 2020, Dr. Sciaroni noted appellant's history of injury and reviewed his prior medical treatment and the statement of accepted facts. She examined him and provided physical examination findings. Dr. Sciaroni noted that appellant's work-related conditions had not resolved, finding that he walked normally, but that he had decreased right knee extension. She opined that his underlying right knee osteoarthritis had been permanently aggravated by fall on the stairs and need for knee replacement surgery. Regarding return to work, Dr. Sciaroni advised that appellant was unable to return to his previous job as a correctional officer, however, she opined that he could work at a sedentary or light-duty job. She noted that he was not capable of running, jumping, or subduing an inmate. Dr. Sciaroni completed a Form OWCP-5c and provided permanent restrictions limiting appellant to sedentary or light work.

On November 30, 2020 OWCP again referred appellant for vocational rehabilitation for plan development within the restrictions noted by Dr. Sciaroni in her September 3, 2020 report. It requested an updated labor market survey for the positions of paralegal and customer service representative, previously identified as within his work restrictions.

In December 2, 2020 report, the vocational rehabilitation counselor updated Form OWCP-66 for the positions of paralegal, DOT No. 239.362-026, and customer service representative, DOT No. 239.362-014. The vocational rehabilitation counselor advised that the customer service representative position was reasonably available within appellant's commuting area and the wage range for the position was from \$604.00 to \$954.00 per week, based on December 2, 2020 state employment data.

On January 28, 2021 OWCP notified appellant that it proposed to reduce his wage-loss compensation based on his capacity to earn wages in the constructed position of customer service representative, DOT No. 239.362-014, at the weekly pay rate of \$604.00. It noted the physical requirement of the position, which was sedentary, did not exceed his medical restrictions as found

by Dr. Sciaroni. OWCP also found that the position was vocationally suitable, based on the rehabilitation counselor's report. Based on the weekly pay rate of \$604.00, it calculated 42 percent wage-earning capacity using the *Shadrick* formula and specified a new periodic compensation rate of \$2,125.00. OWCP afforded appellant 30 days to submit evidence and argument regarding the proposed reduction of his compensation and attached the job classification for the constructed position of customer service representative position completed by the vocational rehabilitation counselor on December 2, 2020 and Dr. Sciaroni's September 3, 2020 work restrictions.

On March 8, 2021 appellant disagreed with the proposal to reduce his wages based on a nongovernment position. He stated that he would not give up his Federal Government work status and benefits for a job in the private sector.

By decision dated April 8, 2021, OWCP reduced appellant's wage-loss compensation, effective that day, consistent with its finding that the constructed position of customer service representative, DOT No. 239.362-014 with weekly earnings of \$604.00, represented his wage-earning capacity.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.² An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity (LWEC).³

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.⁴ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. The fact that an employee has been unsuccessful in obtaining work in

² See *S.F.*, Docket No. 20-0869 (issued October 14, 2021); *S.C.*, Docket No. 19-1381 (issued November 24, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

³ *B.H.*, Docket No 20-0729 (issued March 10, 2021); *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

⁴ 5 U.S.C. § 8115(a).

⁵ *B.H.*, *supra* note 3; *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

the selected position does not establish that the work is not reasonably available in his or her commuting area.⁶

OWCP must initially determine an employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the employee's medical condition.⁷ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁸

When OWCP makes a determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service, a local Chamber of Commerce, employing establishment contacts, and actual job postings.⁹ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,¹⁰ as codified in section 10.403 of OWCP's regulations,¹¹ to determine the percentage of the employee's LWEC.

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective April 8, 2021, based upon his wage-earning capacity in the constructed position of customer service representative.

OWCP determined that appellant's wage-earning capacity was represented by the constructed position of customer service representative, as it was within the medical restrictions provided by Dr. Jaya, a treating physician, as well as OWCP's second opinion physician, Dr. Sciaroni. Following his total knee replacement on January 27, 2017 Dr. Jaya opined on June 18, 2018 that he was partially disabled as a result of the employment injury and unable to return to his correctional officer position. She provided permanent work restrictions of no exertion of force over 50 pounds occasionally, or 25 pounds occasionally. Dr. Sciaroni, in a September 3, 2020 report, also found appellant disabled from performing his duties as a correctional officer, but was capable of performing sedentary and light work duties.

⁶ *Id.*

⁷ *S.F.*, *supra* note 2; *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

⁸ *Id.*

⁹ *C.M.*, *supra* note 5; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7(a)(3) (February 2011).

¹⁰ 5 ECAB 376 (1953).

¹¹ 20 C.F.R. § 10.403.

OWCP, therefore, reopened vocational rehabilitation services on November 30, 2020 as the medical opinion evidence established that appellant was no longer disabled from work due to residuals of his accepted employment injury.¹²

On November 30, 2020 OWCP requested that the vocational rehabilitation counselor provide an updated labor market survey for the positions of paralegal and customer service representative, previously identified as within appellant's work restrictions identified by Dr. Sciaroni and Dr. Jaya.

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a customer service representative. The vocational rehabilitation counselor noted that the position of customer service representative was within the medical restrictions as provided by Drs. Jaya and Sciaroni. The Board, therefore, finds that the weight of the medical evidence establishes that appellant had the physical capacity to perform the duties of the selected position.¹³

In assessing the employee's ability to perform the selected position, OWCP must consider not only physical limitations, but also consider work experience, age, mental capacity, and educational background.¹⁴ In December 2, 2020 report, the rehabilitation counselor indicated that the customer service representative position was vocationally suitable for appellant and available in appellant's commuting area. The report noted that the source of wage data was information from the state dated December 2, 2020, which revealed a wage of \$604.00 per week for the customer service representative position. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on their opinion in determining whether a job is vocationally suitable and reasonably available.¹⁵

The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that he had the capacity to perform the position of customer service representative.¹⁶ It properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,¹⁷ in determining appellant's LWEC and reducing his compensation. The Board thus finds that OWCP properly determined that the position of customer service representative reflected appellant's wage-earning capacity.¹⁸

¹² *S.F.*, *supra* note 2; *C.M.*, Docket No. 19-0360 (issued February 25, 2020).

¹³ *Id.*

¹⁴ *S.F.*, *supra* note 2; *C.M.*, *supra* note 5.

¹⁵ *C.H.*, *supra* note 2; *supra* note 9 at Chapter 2.816.6(b) (June 2013).

¹⁶ *S.F.*, *supra* note 2; *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

¹⁷ 20 C.F.R. § 10.403.

¹⁸ *S.F.*, *supra* note 2; *C.M.*, *supra* note 5.

Appellant objected to the proposed reduction of his wage-loss compensation and argued that he did not want to leave the Federal Government sector for a position in the private sector. However, as previously noted, a determination that he has a wage-earning capacity based upon a constructed position does not actually involve job placement in the position, but rather is a selection of a position listed in the DOT or otherwise available in the open market, which reflects his wage-earning capacity.¹⁹

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective April 8, 2021, based upon his capacity in the constructed position of customer service representative.

ORDER

IT IS HEREBY ORDERED THAT April 8, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 28, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ *Supra* note 11.